

STATEMENT OF THE CASE

Plaintiff-Appellant Hydrotech Corporation (“Hydrotech”) appeals from the trial court’s order awarding Hydrotech attorney fees in association with its litigation against the Indiana Office of Environmental Adjudication (“OEA”).

We affirm in part, and reverse and remand in part.

ISSUES

Hydrotech raises the following issues for our review:

1. Whether the trial court erred by awarding Hydrotech attorney fees from the date of the issuance of an opinion by the public access counselor until the date OEA tendered the records at issue; and
2. Whether the trial court is prohibited from using judicial notice to make a determination of what a reasonable attorney fee is in an action brought under the Indiana Access to Public Records Act (“APRA”) Ind. Code §5-14-3 *et seq.*

FACTS AND PROCEDURAL HISTORY¹

Hydrotech is an environmental engineering firm located in Anderson, Indiana. On October 25, 2004 and October 26, 2004, Hydrotech appeared before the OEA during a hearing in which Hydrotech argued that the Indiana Department of Environmental Management (“IDEM”) had wrongly denied Hydrotech reimbursement from Indiana’s Excess Liability Trust Fund for \$171,000.00 of work performed to remediate leaks from underground storage tanks at an old gasoline station.

At the conclusion of the hearing, the administrative law judge (“ALJ”) ordered the preparation of a transcript of the proceedings as was the custom at the OEA. Ultimately,

¹ We remind counsel for Hydrotech that pursuant to Ind. Appellate Rule 46(A)(6) the statement of the facts should be in narrative form.

the transcript was prepared. On December 29, 2004, in a subsequent telephone conference with the parties, the ALJ asked the parties to contribute to the court reporter's fees for preparation of the transcript. Hydrotech objected to making a contribution for the court reporter's fees and raised the issue of access to public records. The ALJ entered a report of telephone conference in which she stated that any public access request for the transcript would be processed as received in accordance with applicable law. The ALJ entered a final order splitting the cost of the transcript preparation between the parties. Hydrotech was ordered to pay \$905.56.

On January 18, 2005, counsel for Hydrotech appeared in person at the OEA and asked to view the transcript. Counsel was told that the transcript could not be located. At that time, Hydrotech submitted a public records request to obtain access to the transcript. The ALJ denied this request on January 19, 2005.

Hydrotech filed a formal complaint with the Public Access Counselor. The Public Access Counselor concluded, in her decision dated March 7, 2005, that if Hydrotech did not request that OEA prepare the transcript, then OEA could not charge a fee to inspect the transcript under Ind. Code §5-14-3-8(a). Appellant's App. p. 86.

On April 6, 2005, Hydrotech filed a complaint under the Access to Public Records Act. Ind. Code §5-14-3 *et seq.* The matter was set for an expedited hearing on May 3, 2005. On April 29, 2005, counsel for OEA faxed a letter to Hydrotech agreeing to allow inspection of the transcript. Included in the letter was OEA's continued assertion that it had not violated APRA and was not liable for Hydrotech's attorney fees.

The trial court continued the hearing scheduled for May 3, 2005, over OEA's objection, and set a schedule for discovery and summary judgment briefing. Hydrotech filed a motion for partial summary judgment on August 29, 2005. OEA filed a cross motion for summary judgment on October 12, 2005.

The trial court entered its order granting Hydrotech's motion for partial summary judgment and denying OEA's cross motion for summary judgment on November 30, 2005. The trial court concluded that OEA was liable for Hydrotech's attorney fees from the time the Public Access Counselor rendered her opinion, March 7, 2005, until the time the record at issue was tendered in full, April 29, 2005. The trial court directed counsel for Hydrotech to submit an itemization of its reasonable attorney fees, court costs, and other reasonable expenses from March 7, 2005, to April 29, 2005.

On December 19, 2005, Hydrotech submitted the itemization of attorney's fees and supporting materials. Counsel for Hydrotech requested \$3,493.40 in attorney fees. That sum reflected billing for 13.4 hours of work at a rate of \$250 per hour from March 7, 2005, to April 29, 2005. Counsel for Hydrotech reiterated that he was complying with the order to submit an itemization of fees for the time period ordered by the trial court even though he maintained his position that fees and costs beyond that period should be awarded. He did not intend to waive his position on the additional fees. Counsel for OEA filed an objection to the submitted itemization on January 12, 2006. OEA provided affidavits establishing what OEA considered to be a reasonable rate for cases involving access to public records for lawyers practicing in the Indianapolis, Indiana area.

The trial court entered an order on January 24, 2006, awarding counsel for Hydrotech \$2,599.00 in fees and costs. The trial judge indicated in his order that he had taken judicial notice of the fact that a reasonable fee for this kind of case was \$175 per hour.

DISCUSSION AND DECISION

I. ATTORNEY FEE AWARD

On appeal, counsel for Hydrotech does not challenge the order granting summary judgment in favor of Hydrotech. Hydrotech appeals from the trial court's order awarding attorney fees.

Indiana follows the "American rule" under which each party is ordinarily responsible for paying his or her own legal fees in the absence of a fee-shifting statute or contractual provision. *H & G Ortho, Inc. v. Neodontics Intern., Inc.*, 823 N.E.2d 734, 737 (Ind. Ct. App. 2005). Generally, the right to recover attorney fees from one's opponent does not exist in the absence of a statute or some agreement. *Daimler Chrysler Corp. v. Franklin*, 814 N.E.2d 281, 286 (Ind. Ct. App. 2004). Ind. Code §5-14-3-9(i) governs the award of attorney fees for prosecution of an APRA claim. That section provides as follows:

- (i) In any action filed under this section, a court shall award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to the prevailing party if:
 - (1) the plaintiff substantially prevails; or
 - (2) the defendant substantially prevails and the court finds the action was frivolous or vexatious.

The plaintiff is not eligible for the awarding of attorney's fees, court costs, and other reasonable expenses if the plaintiff filed the action without first

seeking and receiving an informal inquiry response or advisory opinion from the public access counselor, unless the plaintiff can show the filing of the action was necessary because the denial of access to a public record under this chapter would prevent the plaintiff from presenting that public record to a public agency preparing to act on a matter of relevance to the public record whose disclosure was denied.

The award of attorney fees is mandatory when the requirements of the statute are otherwise met. *Indianapolis Newspapers v. Indiana State Lottery Commission*, 739 N.E.2d 144, 156 (Ind. Ct. App. 2000). The fee shifting provision of the statute is not triggered until the plaintiff has sought and received an advisory opinion from the PAC. *Id.* However, the award of attorney fees is not dependent upon receipt of a favorable opinion by the PAC. *Id.*

In the present case, counsel for Hydrotech did seek and receive an opinion about his public access request from the PAC. Although not necessary for a recovery of attorney fees, the opinion from the PAC was favorable to Hydrotech. Therefore, if Hydrotech ultimately prevailed, then the fee shifting provision of the statute was triggered.

The trial court granted Hydrotech's motion for partial summary judgment, and denied OEA's cross motion for summary judgment. The issue as presented by Hydrotech is the determination of when Hydrotech substantially prevailed. The trial court concluded that Hydrotech substantially prevailed when OEA tendered the public records for inspection, or April 29, 2005. Hydrotech contends that the trial court erred.

The award or denial of attorney fees is within the sound discretion of the trial court. *Daimler*, 814 N.E.2d at 286. We must affirm the trial court's order unless there is

an affirmative showing of error or abuse of discretion. *See id.* An abuse of discretion occurs when the trial court's award is clearly against the logic and effect of the facts and circumstances before the court. *Id.* at 286-87.

In *Poulard v. Lauth*, 793 N.E.2d 1120 (Ind. Ct. App. 2003), a panel of this court analyzed the issue of statutory fee shifting in regard to anti-SLAPP litigation. Ind. Code §34-7-7-7 provides that a prevailing defendant on a motion to dismiss made under that chapter is entitled to recover reasonable attorney fees and costs. The panel of this court determined that the trial court could not reach the attorney fee question until after all actual or potential issues regarding the applicability of the statute had been resolved and a “prevailing defendant” had been determined. 793 N.E.2d at 1123.

In the present case, OEA, while tendering the public records, denied a violation of APRA, and denied liability for attorney fees associated therewith. Borrowing from the analysis in *Poulard*, we conclude that the trial court could not reach the attorney fee question here until after all actual or potential issues regarding the applicability of APRA had been resolved. Put more simply, Hydrotech did not become a prevailing party until the trial court entered its order granting summary judgment on November 30, 2005. The trial judge erred to the extent that he limited the award of attorney fees.

Both parties have directed our attention to this court's opinion in *Indianapolis Newspapers, Inc.*, 739 N.E.2d 144 (Ind. Ct. App. 2000). OEA argues that its liability for attorney fees, like that of the Lottery in *Indianapolis Newspapers, Inc.*, should be limited until the date complete tender was made. The trial court in this case agreed and limited the award of attorney fees accordingly.

However, the limitation of liability for attorney fees in *Indianapolis Newspapers, Inc.* is unique primarily due to the procedural posture of that case below and on appeal. In *Indianapolis Newspapers, Inc.* a group of retailers sought declaratory and injunctive relief against the Lottery in order to prevent the disclosure of the most current list of all Hoosier Lottery ticket distributors by name, address, city and zip code, and the revenue generated by each of those distributors during a particular year. The Indianapolis Star intervened in that action and filed a cross-claim against the Lottery seeking disclosure of the information. The Lottery deposited the requested information with the trial court and sought dismissal from the action, which was granted.

The panel of this court ultimately determined, in regard to liability for attorney fees under APRA, that the Lottery could be liable for the Star's attorney fees from the time the PAC rendered her opinion until the time when the Lottery made a complete tender of the requested documents with the trial court. 739 N.E.2d at 156. After the date of tender, then the retailers became liable for the Star's fees, unless there was later litigation concerning whether complete tender had been made. *Id.* If the retailers prevailed, then the Lottery would not be liable for any fees. *Id.*

Below, the Lottery maintained the position, after having tendered the documents with the trial court, that it was not liable for any of the Star's attorney fees. The trial court agreed with the Lottery, dismissed them from the action, and held them harmless from payment of any of the Star's attorney fees. Therefore, the Star was required to continue litigating the issue of the Lottery's liability for fees under the statute in this court on appeal. The panel further concluded that the Star substantially prevailed in this

court on appeal, remanded the matter to the trial court for the purposes of holding a hearing to take evidence on the appellate attorney fees incurred by the Star in the matter, and directed the trial court to award the Star appellate attorney fees against the Lottery. *Id.*

In the present case, the OEA tendered the requested documents with the trial court, but denied a violation of APRA or any liability for attorney fees under that act. OEA argued, as the Lottery did, that the tender of the requested documents removed any liability under APRA.

However, the tender of the requested documents is not dispositive of the issue of fee liability. The OEA maintained that it had not violated APRA and was not liable for Hydrotech's attorney fees. Therefore, Hydrotech was required to continue litigation below to determine if the OEA improperly denied access to the public record.

The trial court determined that the OEA had improperly denied Hydrotech access to the public record. Once that determination had been made, the trial court was required by statute to award Hydrotech attorney fees under the statute.

However, the trial court abused its discretion by placing a limitation on Hydrotech's recovery of attorney fees. The determination of the propriety of the denial of access to a public record is dispositive of which party substantially prevails for purposes of APRA. *Indianapolis Newspapers, Inc.*, 739 N.E.2d at 156. Because that determination wasn't made until partial summary judgment was entered, the trial court erred by limiting the award of attorney fees until tender was made.

Furthermore, because Hydrotech has been required to litigate the issue here on appeal, and we have determined that the trial court erred by limiting the award, Hydrotech has substantially prevailed with this court. Therefore, we remand this matter to the trial court for a hearing to take evidence on the issue of the amount of attorney fees incurred by Hydrotech to pursue this appeal. The trial court is instructed to make an appropriate appellate attorney fee award against OEA.

II. JUDICIAL NOTICE

The remaining issue addressed by the parties is whether the trial court erred by taking judicial notice of what an appropriate fee is for this type of case.

Counsel for Hydrotech submitted an itemized statement of fees for his work in obtaining access to the transcript in this matter. The trial court awarded a lesser amount to Hydrotech. Hydrotech claims on appeal that the trial court took judicial notice of an appropriate fee and in so doing erred.

A trial court's decision as to the amount of attorney's fees will be reviewed under an abuse of discretion standard. *Daimler Chrysler Corp.*, 814 N.E.2d at 287. Although a trial court may take judicial notice of what constitutes a reasonable amount of attorney fees, such practice should be limited to routine cases involving relatively small amounts. *McGehee v. Elliott*, 848 N.E.2d 1180, 1191 n.4. (Ind. Ct. App. 2006). When the amount of the fee is not inconsequential, there must be objective evidence of the nature of the legal services and the reasonableness of the fee. *Id.* In determining what a reasonable amount of attorney fees would be in a particular case, consideration should be given to

the nature and difficulty of the litigation; the time, skill and effort involved; the fee customarily charged for similar legal services; the amount involved; and the time limitations imposed by the circumstances. *Id.*

In the present case, counsel for Hydrotech submitted along with the itemization of hours worked, his own affidavit regarding his qualifications, fees and rate, and an affidavit of an attorney admitted to the bars of Ohio and Texas who practices in the area of environmental law including administrative law practice before state and federal agencies. Both affidavits submitted supported the rate of \$250 per hour for counsel's work.

OEA filed an objection to Hydrotech's itemization of attorney fees. Included with that objection were affidavits to support the award of a lesser amount of attorney fees. Both affidavits were from attorneys practicing in Marion County, Indiana. OEA's first affidavit established that the attorney's current hourly rate for a general legal matter was \$150 per hour, and that an access to public records case would be a general legal matter. OEA's second affidavit established that the attorney handled cases involving access to public records, that his hourly rate for general legal matters was \$140 per hour, and that a case involving access to public records would be a general legal matter.

We find that the trial court did not take judicial notice of a reasonable fee in this instance. Instead, the trial judge had before him evidence by way of affidavits of the fees customarily charged for similar legal services, and the nature and difficulty of the litigation. The trial court's determination of a reasonable fee is within the range of evidence presented. Therefore, we affirm the trial court's decision in this regard.

Because judicial notice was not employed in this matter, we do not address the issue of whether a trial judge errs by taking judicial notice of a reasonable fee in an APRA action.

CONCLUSION

The trial court erred by limiting the award of attorney fees to the hours billed prior to the date the documents were tendered by OEA. A party does not prevail in an APRA action until a determination is made regarding the propriety of the denial of access to public records. Once a party prevails, attorney fees shall be awarded from the date of the PAC's opinion until the date a prevailing party is determined. The trial court erred by using the date of tender by OEA to limit the attorney fee award.

The trial court did not err by determining the rate of a reasonable fee in this matter that was within the range of evidence.

Because Hydrotech was required to pursue its attorney fees in this court, we remand this case to the trial court for a hearing during which evidence of Hydrotech's appellate attorney fees shall be submitted and an appropriate award shall be made against OEA.

Affirmed in part, reversed and remanded in part.

SHARPNACK, J., and MATHIAS, J., concur.